

No. 15889

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*vs.*

THE DEUTSCH COMPANY,

*Respondent.*

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THE DEUTSCH COMPANY,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

---

On the Petition for Enforcement of an Order of the National Labor Relations Board and a Petition to Modify and to Set Aside Orders of the National Labor Relations Board.

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## BRIEF FOR THE DEUTSCH COMPANY.

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### I.

Where the elected officials of the Union have abandoned their offices in the Union and non-elected officials of a separate Union have purportedly usurped the powers and functions of its said officers and are acting without any authority and without complying with the constitution and by-laws of the Union, and the Union for which they purport to act has never been certified as the exclusive bargaining agent for any of the "employer's" employees, then the said Union does not represent any of such employees and there is no existing Union which meets the description of the exclusive bargaining representatives of the "employer's" employees as set forth in the certification of representatives, and this honorable court should set aside the orders of the Board because the Board should have heard the entire of the testimony in regard to the said matter and upon the facts rejected in the complaint..... 28

II.

Where, after a representation hearing, the National Labor Relations Board made its purported decision and direction of election, and purported to hold a certification election while the "employer's" petition for rehearing and reconsideration and stay of the election was pending before the Board, and before the Board made its order or gave notice of its order or ruling upon the said petition to the "employer" or its agents or attorneys, the purported election was held, the total number of those voting at the election equaling no more than forty per cent (40%) of the number of the eligible voters among the employees, the action of the Board in purporting to conduct an election and in purporting to issue a certification of representatives and in enforcing the said certification of representatives by bringing on for hearing the complaint herein was and is an abuse of its discretion, illegal and invalid, since the Board has violated its rules and regulations, the provisions of the National Labor Relations Act, the Administrative Procedure Act, and the Constitution of the United States in depriving the "employer" and its employees of due process of law ..... 34

III.

A complaint alleging a violation of Section 8(a)(1) and (5) of the Act on the ground that "employer" refused to bargain with the Union as the exclusive representative of the employees in a unit for bargaining consisting of the production and maintenance employees at both of the plants, which unit is inappropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the National Labor Relations Act, should be dismissed..... 38

- A. The only unit appropriate for purposes of collective bargaining, under Section 9(b) of the National Labor Relations Act, is the single plant unit, and a company unit is inappropriate, where the "employer" has two (2) plants which are geographically separated, which manufacture different products and sell the products separately out of separate sales departments and separate catalogs, which separate plants are in different cities, and are operated under separate autonomous plant managers, with the authority to hire and fire employees, each responsible only to the board of directors of the "employer's" corporation, where the separate plants have different working conditions and hours of work, where the skills employed in each of the separate plants are different from those employed in the other, the employees in one plant being mostly highly skilled machinists (the Avalon plant), and the employees in the other plant being unskilled assemblers and packagers (the Regent plant), where each plant has rates of pay different from the other, where the classification of the workers by sex is predominantly male at the Avalon plant, and almost entirely female at the Regent plant, where the "employer" has no uniform personnel policy for both of its plants, there being an incentive plan at the Avalon plant, and no incentive plan at the Regent plant, where there is no interchange of personnel between the plants nor uniform seniority list between the plants and where the majority of the production and maintenance employees at one plant, by secret ballot election, expressed their wish not to be represented by the Union (the Avalon plant), while it was and is believed, in good faith, by both the Union and the "employer" that a majority of the production and maintenance employees at the other plant (the Regent plant) did desire representation by the Union.. 38

- B. Where the "employer" has not refused to bargain with the Union on the basis of the unit appropriate for collective bargaining purposes under Section 9(b) of the National Labor Relations Act, a complaint alleging a violation of Sections 8(a)(1) and (5) for refusal to bargain will be dismissed..... 46

## IV.

The Board's purported decision and direction of election does not conclusively determine the issue of what is the appropriate unit for purposes of collective bargaining upon a complaint based on an alleged charge by the Union that the "employer" has violated Section 8(a), subsections (1) and (5), of the Act in refusing to bargain with the Union, where, since the representation hearing there has been either evidence newly discovered which would affect the determination of the appropriate unit or where, since the representation hearing, there has been a change of circumstances or where the finding of the Board as to the appropriate unit in its decision and direction of election and its conduct of the election was arbitrary and an abuse of its process.... 47

- A. A finding of the Board as to the appropriate unit is not conclusive and should be set aside where there is evidence newly discovered since the representation hearing that the "employer" and the Union agreed that a separate plant unit was the appropriate unit and to conduct a consent election wherein the employees voted on a single-plant basis in a secret ballot consent election conducted by the Union and the "employer" to determine whether they desired to be represented by the Union for purposes of collective bargaining and where, upon a vote of one hundred per cent (100%) of the eligible employees at the Avalon plant, a majority thereof voted against representation by the Union..... 47

- B. A finding of the Board as to the appropriate unit is not conclusive and should be set aside where there is a change of circumstances since the representation hearing that the "employer" and the Union agreed that a separate plant unit was the appropriate unit and to conduct a consent election wherein the employees voted on a single-plant basis in a secret ballot consent election conducted by the Union and the "employer" to determine whether they desired to be represented by the Union for the purposes of collective bargaining and where upon a vote of one hundred per cent (100%) of the eligible employees at the Avalon plant, a majority thereof voted against representation by the Union ..... 51
- C. A finding of the Board as to the appropriate unit is not conclusive and should be set aside where the Board acted arbitrarily and abused its processes in making its finding and its decision and direction of election based thereon, directing an election among the employees in a Company unit consisting of the production and maintenance employees in both of the plants, where there was not sufficient evidence at the representation hearing to support such a finding, and where such a finding and direction of election is contrary to the evidence upon the representation hearing and the law..... 53

## V.

Where the “employer” negotiated with the Union, and bargained with the Union, and after so doing, entered into an agreement in writing with the Union, which agreement was authorized by the Union’s membership, that the Union and the “employer” would conduct among the employees at one of the plants, a private consent election in accordance with the procedure and regulations of the National Labor Relations Board to determine whether these employees desired to be represented by the Union, and the said election was conducted pursuant to the terms of the said agreement, at which election all of the eligible employees at the said plant voted, and the results of the said election conclusively established that a majority of the employees did not desire to be represented by the Union, the Union is bound by the said agreement and the results of the said election that it would not continue to act as the collective bargaining representative of the said employees at the said plant, and the said agreement, and the said election, constitute bargaining between the “employer” and the Union, and are of full force and effect as determining the rights of the “employer,” the Union, and the employees, and the “employer” has bargained with the Union, as required by Section 8(a)(5) of the National Labor Relations Act, and has not interfered with, nor restrained, nor coerced its employees in the exercise of their rights guaranteed under Section 7 of the Act, nor has the “employer” violated Section 8(a)(1) of the Act, and the Union is estopped from contending that it is not bound by the said agreement and the results of said election or that the “employer” has violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, or that any question “affecting commerce” exists concerning representation of the employees under Sections 9(c), 2(6) and 2(7) of the National Labor Relations Act ..... 56

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**BRIEF FOR THE DEUTSCH COMPANY.**

---

*To the Honorable Chief Justice of the United States Court of Appeals for the Ninth Circuit and the Associate Justices Thereof:*

Petitioner-respondent, The Deutsch Company, respectfully praying that the Petition of the National Labor Relations Board for Enforcement of its Order should be denied and the Petition of The Deutsch Company to Modify and Set Aside the Orders of the National Labor Relations Board should be granted, comes now and in support thereof respectfully submits:

## Statement of Proceedings and Jurisdiction.

This case is before this Honorable Court upon the Petition of the National Labor Relations Board for Enforcement of its Order [Tr. pp. 105-107], the Answer of Petitioner-Respondent The Deutsch Company to the said Petition for Enforcement [Tr. pp. 125-142], and upon the Petition of The Deutsch Company to Modify and Set Aside the Orders of the National Labor Relations Board [Tr. pp. 108-125].

Heretofore, the Board, after a hearing, issued its Decision and Direction of Election and Certification of Representatives and Orders in Representation Case No. 21-RC-4365 [Tr. pp. 211, 342-344, 253, 352, 333, 449-451; General Counsel's Exs. 2, 3, 4 and 8; Resp. Exs. 8 and 9]. Thereafter, a Complaint was filed in Case No. 21-CA-2581 by the Regional Director of the Twenty-First Region of the National Labor Relations Board, based upon an amended charge against the employer dated November 21, 1956, brought by the United Industrial Workers, Local 976, AIW-AFL-CIO, against The Deutsch Company alleging that the said Employer had been and was engaging in unfair labor practices within the meaning of Section 8(a), subsections (1) and (5) of the National Labor Relations Act. A hearing was conducted on January 14 and 15, 1957, in Los Angeles, California, before the Honorable Martin S. Bennett, Trial Examiner. The Trial Examiner thereafter gave his Intermediate Report and Recommended Order [Tr. pp. 29-79]. On February 19, 1957, the case was transferred to the National Labor Relations Board by an Order transferring the case, and, on September 4, 1957,

the Board issued its Decision and Order in the matter [Tr. pp. 80-85].

The jurisdiction of the Board arises because the Employer is engaging in interstate commerce in the manufacture of aircraft parts and components and screw machine products.

This Honorable Court has jurisdiction to review said Orders by reason of the Petitions of the National Labor Relations Board and The Deutsch Company under Section 10, subsections (e) and (f) of the National Labor Relations Act as amended, 29 U. S. C. A. 160(e) and (f).

### **Statement of Facts.**

#### **1. Description of Employer's Plants and Employees.**

The Deutsch Company (sometimes hereinafter referred to as "Employer") is a manufacturing corporation organized and incorporated under and pursuant to the laws of the State of California. Since 1954, it has operated two (2) plants, the main manufacturing plant, which also contains assembly and shipping facilities, at 7000 South Avalon Boulevard (sometimes hereinafter referred to as the "Avalon Plant"), and an assembly and shipping and receiving plant for specific Army-Navy fittings and electric couplings at 6345 Regent Street, Huntington Park, California (sometimes hereinafter referred to as the "Regent Plant") [Tr. pp. 164-165].

The Avalon Plant is a machine shop operation; the majority of the Avalon employees are highly skilled machine operators; even the Avalon assemblers are semi-skilled operators, who are capable of doing and do a substantial amount of work on drill presses [Tr. pp.

311-313]. The Regent employees are unskilled assemblers and packagers, none of whom, for example, are qualified to do, nor do they work on drill presses [Tr. pp. 313-314].

There is a substantial and significant difference between the items produced by each of the Plants [Tr. p. 165]. The Avalon Plant manufactures and assembles valves, rivets and various screw machine products [Tr. p. 311]. The Regent Plant, however, does no manufacturing; it is involved only with assembling a limited class of Army and Navy electronic and aircraft components [Tr. pp. 176, 311]. The type of assembly work is substantially different, involving different skills and working conditions.

Each plant has its own sales department, its own sales catalogs, and its own packaging and shipping and receiving departments [Tr. pp. 168-169, 317].

Each plant has its own separate and autonomous manager and supervisor, Mr. Philip Holzman at Avalon and Mr. Edward Jones at Regent [Tr. pp. 171-172, 315-316].

There are twenty-two (22) general job classifications at the Avalon Plant, whereas there are only four (4) at the Regent Plant. The four (4) at the Regent Plant, are duplicated in name only at the Avalon Plant. There is no identity or duplication in the type of work done or in the product worked upon. The four (4) job classifications which use the same names at each Plant are: assembler, packager, shipping and receiving clerk, and production and control clerk [Tr. pp. 311-313].

Regent Street receives eight and one-third per cent (8 and  $\frac{1}{3}\%$ ) of the output of the Avalon Plant for its

material components requirements for assembly functions [Tr. p. 311].

The Avalon Plant at present has approximately three hundred seventy-five (375) employees, while the Regent Plant has eighty-five (85) employees. Two-thirds ( $\frac{2}{3}$ ) of the Avalon Plant employees are male, and one-third ( $\frac{1}{3}$ ) female; at the Regent Plant, seven-eighths ( $\frac{7}{8}$ ) of the employees are female, and one-eighth ( $\frac{1}{8}$ ) male [Tr. p. 313].

The Avalon Plant works on two (2) shifts, with different shift hours for male and female employees and different rest periods for male and female employees. The Regent Plant, however, works only one (1) shift. The Avalon Plant regularly schedules overtime work on Saturday every other week. Thus, its working schedule alternates between a five (5) day week and a six (6) day week. The Regent Plant very seldom, and then only irregularly, schedules any overtime work [Tr. pp. 165, 313-315].

There is no uniform personnel policy with respect to the two (2) plants. For example, incentive pay is awarded at the Avalon Plant, but not at the Regent Plant. There is no interchange of personnel between the Plants, nor any practice of giving seniority to the employees of both plants on one seniority list. Moreover, rates of pay are different because the employees perform different tasks [Tr. p. 315].

A majority of the "Employer's" production and maintenance employees at its Avalon Plant do not desire to be represented by the Union for the purposes of col-

lective bargaining, while a majority of the production and maintenance employees at Regent did favor representation by the Union [Tr. pp. 247, 315].

**2. Chronology of Events With Regard to Representation and Collective Bargaining at "Employer's" Plants.**

Commencing with May of 1955, the United Industrial Workers Local 976, AIW-AFL-CIO, as it was then named (sometimes hereinafter referred to as the "Union"), conducted an organizational drive at "Employer's" plants.

On March 28, 1956, the Union filed a Petition for Certification of Representatives, in Case No. 21-RC-4365. The Petition alleged as the address of the "Employer" only the Avalon Plant address [Tr. p. 162].

Representation hearings in the said Representation Case were held on May 8, 10, 11 and 17, 1956. Upon the Representation Hearings:

(a) The International Association of Machinists, District 94, AFL-CIO, and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO were intervenors [Tr. pp. 160-162];

(b) Some evidence as to the appropriate unit for collective bargaining was introduced, but the Petitioning Union, the United Industrial Workers, did offer to stipulate on all of the evidence presented at the Representation Hearing that the unit of "Employer's" employees appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is the separate plant unit, which stipulation was and is acceptable to the "Employer" [Tr. pp. 189-195];

(c) There was no evidence introduced as to (nor was there any way at that time of obtaining the evidence without a self-determination election) of the sentiment of the “Employer’s” employees at each of the “Employer’s” plants to determine their desire with reference to being represented for collective bargaining purposes by a Union.

In spite of the lack of any evidence upon the Representation Hearing to support a finding that the appropriate unit of “Employer’s” employees for the purposes of collective bargaining was the entire company unit, and, notwithstanding the stipulations acceptable to the Union and the “Employer”, the Board, on or about July 9, 1956, made its purported Decision and Direction of Election in Case No. 21-RC-4365, wherein it directed that an election be conducted in the Company unit. The Board did, however, find [General Counsel’s Ex. 2] that a separate unit at each of “Employer’s” plants would be appropriate for the purposes of collective bargaining, as well as the Company unit, consisting of both plants [Tr. pp. 211, 338-341].

On or about July 24, 1956, “Employer” filed with the National Labor Relations Board its Petition for: (1) Rehearing and Reconsideration by the Board of its Decision and Direction of Election, and (2) an Order suspending election pending determination of the Petition and further decision and order of the Board; and (3) an Order authorizing and permitting Petitioner to offer and submit new and additional evidence; and (4) an Order vacating previous Decision and Direction of Election; and (5) an Order dismissing the Petition of the Union for certification [Resp. Ex. 6; Tr. pp. 320, 424-446].

On or about August 8, 1956, the Regional Office of the Board purported to hold an election. Neither the "Employer" nor its Labor Relations Consultants, nor its attorneys, had received any notice in any manner whatsoever from the Board as to its decision on the said Petition of the "Employer" then pending before the Board [Tr. pp. 326-330].

The purported Election was held on August 8, 1956, over the objections of the "Employer." There was no employees' list of "Employer's" employees in the hands of the persons purporting to conduct the election, nor was the election held on the Plant premises. Less than forty per cent (40%) of the "Employer's" employees eligible to vote cast ballots at that election [Tr. pp. 248-249].

On August 10, 1956, the Board by telegram notified the "Employer", by notifying its Labor Relations Consultant and its Attorneys, of its ruling upon the "Employer's" said Petition, by stating that the said Petition "is hereby denied" [Resp. Exs. 8 and 9; Tr. pp. 251-254, 333, 449-451].

On August 20, 1956, the Board purported to issue a Certification of Representatives, which certified the United Industrial Workers, Local 976, AIW-AFL-CIO, as the representative of the "Employer's" employees in the Company Unit for the purposes of collective bargaining [General Counsel's Ex. 3; Tr. pp. 211, 342-343]. This Order was purportedly amended on October 29, 1956, to change the name of "United Industrial Workers" [General Counsel's Ex. 4; Tr. pp. 211, 343-344].

On September 14, 1956, Anthony Doria, the Secretary-Treasurer of the Union, wrote a letter to the "Employer" requesting arrangements for negotiations between the Union and the "Employer." A copy of the letter was sent to H. DeVoe Rea & Associates, the Labor Relations Consultants of the "Employer," the retaining of which firm as consultants, as appears on the face of the letter [General Counsel's Ex. 5; Tr. pp. 345-347] was known to the Union. Thereafter, Mr. Thomas Aiken of the office of H. DeVoe Rea & Associates, telephoned Mr. Doria, and a meeting was arranged [Tr. p. 274].

On September 24, 1956, the "Employer" sent to the Union a telegram advising that any meetings should be arranged with H. DeVoe Rea & Associates, its Labor Relations Representatives [Resp. Ex. 3; Tr. p. 375].

A meeting was held on September 26, 1956, between H. DeVoe Rea and Thomas Aiken, representing the "Employer", and Anthony Doria, representing the Union, in the offices of H. DeVoe Rea. At that time, the "Employer" bargained with the Union on various subjects which might be provisions in an Agreement between them [Tr. pp. 275-277]. Some of these subjects of bargaining were set forth in a memo by Mr. Doria in his own handwriting and given to Mr. Rea [Resp. Ex. 1; Tr. pp. 277, 372-373].

Thereafter, Mr. Doria left the city for approximately two (2) weeks. In the interim, two (2) of the business agents of the Union at a chance meeting had a discussion with Mr. Philip Holzman, the manager of the Avalon Plant, suggesting that a consent election be held at the Avalon Plant to determine whether a majority of the

employees at the Avalon Plant desired to be represented by the Union. Both the business agents and Mr. Holzman agreed to go back to their principals for further discussion of the proposal by the business agents [Tr. pp. 303-305].

During the latter part of October and early November, 1956, Mr. Thomas Aiken had telephone discussions with Mr. Doria with regard to the Union's proposal that a consent election be conducted by the Respondent and the Union at the Avalon Plant [Tr. pp. 277-282].

On October 2, 1956, the Union filed an Unfair Labor Charge against the Company, alleging violations of Section 8(a)(1), (3) and (5) of the Act. On November 1, 1956, the Company wrote to the Board denying the truth of any allegation in the charge of October 2, 1956. No Complaint was ever issued on that charge.

On November 11, 1956, the majority of the Union members at its meeting authorized the Union to enter into an agreement for the conducting of a consent election at the Avalon Plant by the Union and the Company [Tr. pp. 337, 368-372].

On November 12, 1956, a meeting was held at the offices of H. DeVoe Rea, at which there were present: Anthony Doria, the Secretary-Treasurer of the Union and Peter Lentini, the Business Agent of the International with which the Union is affiliated, and the President of the Union, and Mr. Thomas Aiken of H. DeVoe Rea & Associates, and Mr. Philip E. Holzman, the General Manager of the Avalon Plant, and Mr. Edward Jones, the General Manager of the Regent Plant. After extensive negotiations and bargaining between the Union and the

“Employer”, a written agreement was entered into [Resp. Ex. 4; Tr. pp. 375-377], whereby the Union agreed with the Company as follows: That a consent election would be conducted by the Union and the “Employer” on Friday, November 16, 1956, at the Avalon Plant, in order to establish whether the Union represented a majority of the production and maintenance employees at the Avalon Plant; the payroll date of July 8, 1956, would be used in the election to determine eligibility of employee voters (This was the same payroll date as was used in the Board-Conducted election in August); production and maintenance employees would be those fitting the description in the Board’s purported Decision and Direction of Election; observers of the conduct of the election and the manner of challenging of ballots were agreed upon; if the majority of the employees voting, voted for the Union, then the “Employer” would immediately enter into further bargaining negotiations with the Union for the Avalon Plant on such additional subjects as to which bargaining was desired by the Union; the “Employer” would continue to bargain with the Union with regard to the Regent Plant, regardless of the outcome of the election; if a majority of the employees voting, voted against representation by the Union, the Union would refrain from any type of harassing action against the “Employer,” including any work stoppage or interference of any kind with production; by direct implication, the Union recognized that the appropriate unit of “Employer’s” employees for collective bargaining was and is the separate plant unit, and the Union would accept the desires of the majority of the employees at the Avalon Plant as evidenced by the results obtained upon the con-

sent election to determine whether or not the Union would represent the employees at the Avalon Plant; the Union waived and abandoned its rights, if any under the purported Decision and Direction of Election and the purported Election of August 8, 1956, to bargain for the employees of "Employer" at its Avalon Plant [Tr. pp. 238-240, 306, 322-324].

The Consent Election was held on November 16, 1956 and one hundred sixty-nine (169) votes were cast for no Union representation, while only one hundred thirty-seven (137) votes voted for the Union [Tr. p. 247].

On November 21, 1956, the Union filed with the Board its Charge, which alleged a violation by the "Employer" of Sections 8(a), (1) and (5) of the Act. The Union did not advise the Regional Director or any of his staff that the Union and Respondent had entered into the written agreement of November 12, 1956, or that a Consent Election had been held or what the results of the election were [Tr. pp. 250-251].

On December 4, 1956, the "Employer", by Thomas Aiken of its Labor Relations Consultants, had a meeting lasting approximately four (4) hours, with Anthony Doria, Peter Lentini, Dorothea Powell, David Castro and Benny Benedetto. At that meeting, the "Employer" bargained with the Union on the terms of a proposed Collective Bargaining Agreement. Each of the items in a Collective Bargaining Agreement form were discussed. Mr. Aiken, on behalf of Respondent at the time of the meeting made notes of the discussion on his copy. [Resp. Ex. 5; Tr. pp. 284-286, 378-424].

On December 5, 1956, the General Counsel issued, on behalf of the Board, his Complaint in this case, based

upon the alleged violations in the Charge of November 21, 1956 [Tr. pp. 7-11].

On December 14, 1956, Mr. Doria and Mr. Aiken had a telephone conversation, discussing the meeting of December 4, 1956. At that time, Mr. Doria admitted that the form of Collective Bargaining Agreement which he had proposed at the December 4th meeting was extreme, and that his proposals for the Regent Street Plant involved a Union shop, a check-off, and an increase in wage rates in the amount of approximately twelve cents (12¢) an hour. Mr. Aiken requested that Mr. Doria put his proposals in writing, and Mr. Doria agreed that he would. He has not ever done so [Tr. pp. 288-289].

### 3. "Employer's" Offer of Stipulation.

The "Employer" throughout these proceedings offered to stipulate and agree to a consent order whereby the purported Decision and Direction of Election and the Certification of Representatives on which it was based would be withdrawn, the unit of "Employer's" employees appropriate for the purposes of collective bargaining would be the single plant unit, with one unit consisting of the Avalon Plant and one unit consisting of the Regent Plant, a self-determination election would be held at "Employer's Avalon Plant, under the auspices of, and conducted by, the Board to determine whether or not the production and maintenance employees at the Avalon Plant, as defined in the said Decision and Direction of Election, desired to be represented by the Union. For this purpose, the "Employer" is willing to concede that a majority of the production and maintenance employees at the "Employer's" Regent Plant did favor representation by the Union [Tr. pp. 208-210].

**4. Facts Concerning Schism Within the Union and Basis for Review of Board Certification of Representatives and Decision and Direction of License Herein.**

From May of 1955 until September, 1957, the officers of the Union consisted of one Nick Nardi as the President, and, in turn, Anthony Doria, Bradley Smiler and Peter Lentini, as Secretary and Treasurer thereof.

On or about September 6, 1957, the said Union, United Industrial Workers, Local 976, OIW-AFL-CIO, by its Secretary, Peter Lentini, sent a letter to The Deutsch Company requesting notification of a date, time and place when negotiations might be conducted on a proposed agreement.

Thereafter certain persons, including Carl W. Griepentrog, Frank Evans and Bert Backinger, claiming to be, respectively, the President, an Executive Board Member, and a Vice President of the International Union, Allied Industrial Workers of America, affiliated with AFL-CIO, called upon The Deutsch Company and its representatives and claimed to be the persons who are entitled to bargain with The Deutsch Company in connection with and as agent and exclusive representative of The Deutsch Company's employees for the purpose of collective bargaining. Insofar as The Deutsch Company has been informed, neither Carl W. Griepentrog, nor Frank Evans, nor Bert Backinger were or are elected officials of United Industrial Workers, Local 976, AIW-AFL-CIO, but they have usurped the powers of the officials of the said Union and they are acting without any authority of the said Union and without complying with the Constitution or the By-Laws of the said Union. The Allied Industrial Workers

of America, for which the said Griepentrog, Evans and Backinger claimed to be spokesman, is not, and never has been certified as the exclusive representative of any of the employees of The Deutsch Company. The said Union does not represent any of the employees of The Deutsch Company.

All of the officers of the Union which purported to be certified, including Anthony Doria, Peter Lentini, Nick Nardi and Bradley Smiler, have abandoned and discontinued their offices and said Union has either been dissolved or they have formed another and separate Union, as The Deutsch Company has been informed and believes.

By reason of the foregoing, there is no existing union which meets the description of the exclusive bargaining representative of The Deutsch Company's employees as set forth in the Certification of Representatives in this case. There is, therefore, no existing union which is certified as the exclusive bargaining representative for the employees of The Deutsch Company.

The Deutsch Company has received conflicting demands from certain persons consisting of said Peter Lentini and others, on the one, had to negotiate with them, alleging that they are officers of United Industrial Workers, Local 976 AIW-AFL-CIO, and from Evans and Backinger, on the other hand, purporting to be officers of the Allied Industrial Workers of America, affiliated with the AFL-CIO, alleging that negotiations must be conducted with them. There is apparently a conflict, and it is the belief of The Deutsch Company that neither of the groups involved is authorized to represent the employees

of The Deutsch Company as the exclusive representatives for purposes of collective bargaining under the said certification of representatives or otherwise.

All of the foregoing was brought to the attention of the National Labor Relations Board by the Motion of The Deutsch Company for: (1) Rehearing and Reconsideration by the Board of its Decision and Order; and (2) an Order Setting Aside Previous Decision and Direction of Election; and (3) an Order Setting Aside the Previous Certification of Representatives and Amendment Thereto [Tr. pp. 86-101].

On November 7, 1957, the Motion of The Deutsch Company was denied [Tr. pp. 103-104].

### **Specification of Errors.**

#### **I.**

An implied ruling that where the elective officers of the Union have abandoned their offices in the Union and non-elected officials of a separate Union have purportedly usurped the powers and functions of the said officers and are acting without having authority and without complying with the Constitution and By-Laws of the Union, and the Union for which they purport to act has never been certified as the exclusive bargaining agent of any of the "Employer's" employees, the said Union represents such employees and there is an existing Union which meets the description of the exclusive bargaining representatives of "Employer's" employees as set forth in the Certification of Representatives.

That the National Relations Labor Board has abused its discretion and acted contrary to the National Labor Relations Act and the United States Constitution in re-

fusing to hold a hearing and take testimony on the facts thereof and in denying summarily “Employer’s” Motion for (1) Rehearing and Reconsideration; and (2) an Order Setting Aside the Decision and Direction of Election; and (3) an Order Setting Aside the Certification of Representatives.

Citation of Record: Tr. pp. 86-101; 103-104.

## II.

The Board’s Conclusions and Findings that the conducting of an election among “Employer’s” employees by the National Labor Relations Board adjacent to the premises of the “Employer’s” plant, but without either a list of the employees qualified to vote, and without any notice to the “Employer” or its employees that the election was being conducted, and at which election only a number of ballots equal to forty per cent (40%) of the number of employees eligible to vote were cast, and which election was conducted pending the hearing upon and prior to the Board’s ruling and notice of its ruling to Employer upon its Petition for Rehearing and Reconsideration by the Board of its Decision and Direction of Election and for an Order Suspending the Election pending the determination of the Petition and for an Order authorizing and permitting the “Employer” to offer new and additional evidence, and for an Order vacating the previous Decision and Direction of Election, and for an Order Dismissing the Union’s Petition for Certification, was a valid election binding upon the “Employer” and was a valid basis for the issuance of a Certificate of Representatives under the National Labor Relations Act.

This Finding or Conclusion is unsupported by any evidence in the record, is based upon the speculation of the Trial Examiner, is contrary to the National Labor Relations Act, the Rules and Regulations of the National Labor Relations Board and the Administrative Procedure Act, and the United States Constitution, and would deprive the Union and the "Employer" and the employees of their right to a fair hearing and a proper determination of the appropriate collective bargaining unit and a fair election to determine the desires of the employees as to their collective bargaining agent.

The recommendations based on this Improper Finding or Conclusion are contrary to the National Labor Relations Act and the Administrative Procedure Act and the Rules and Regulations of the National Labor Relations Board.

The Finding or Conclusion resulted in part from certain improper Rulings of the Trial Examiner upon certain of "Employer's" motions and objections, which permitted improper and incompetent testimony and evidence, speculations and conclusions of witnesses, testimony in violation of the parol evidence rule, immaterial and irrelevant testimony and documents, self-serving testimony and documents, hearsay evidence, and were contrary to law and the evidence.

Citation of the Record:

*Intermediate Report and Recommended Order:*

Tr. pp. 35-39, 52-55, 60-64, 69, 75-85.

*Transcript of Proceedings Before the Trial Examiner:*

Tr. pp. 208, 210-211, 249-250, 252-253, 272-273, 296-297, 330.

### III.

The Board's Conclusions and Findings that where, upon Representation Proceedings at the conclusion of which the National Labor Relations Board issued its Decision and Direction of Election which found, among other things, that a separate unit at each of "Employer's" plants could be appropriate for the purposes of collective bargaining, and thereafter certified the Union as the representative for a single unit of the production and maintenance employees consisting of both of "Employer's" plants as appropriate, although no evidence was introduced at the representation proceedings or was available or was able to be obtained with the exercise of due diligence by the "Employer" or the Union that, subsequent to the Certification of Representatives, the "Employer" and the Union agreed in writing that the "Employer" and the Union would conduct a private consent election at one of "Employer's" plants to determine whether the employees in that Plant desired to be represented by the Union and the said election was conducted in accordance with the procedures of the National Labor Relations Board, although it was not conducted by the Board, and at such election all the employees at said plant eligible to vote voted and a majority thereof voted against representation by the Union, the said Agreement in writing, the said election, and the results of the said election, are not evidence newly discovered, and were available to the "Employer" and were obtainable at the time of the Representation Hearing with the exercise of due diligence, which, if presented to the Board, would not have caused said Board to find that a separate unit at each of the said plants was the appropriate

unit for the purposes of collective bargaining, and were not a change of circumstances that would have caused said Board to find that a separate unit at each of said plants was the appropriate unit for the purposes of collective bargaining, and the issuance of its Decision and Direction of Election, and the conducting of its election pending its determination of "Employer's" Petition for Reconsideration by the Board and the issuance of its Certification of Representatives was not an arbitrary act of the Board and an abuse of the Board's discretion.

This Finding or Conclusion is unsupported by any evidence in the record, is based upon the speculation of the Trial Examiner, is contrary to the National Labor Relations Act, the Rules and Regulations of the National Labor Relations Board and the Administrative Procedure Act and the United States Constitution, and would deprive the Union and the "Employer" of their right to reach an agreement reduced to writing with the ultimate purpose of composing their differences, and to a fair hearing and a proper determination of the appropriate collective bargaining unit and a fair election to determine the desires of the employees as to their collective bargaining agent.

The Recommendations based on this improper Finding or Conclusion are contrary to the National Labor Relations Act and the Administrative Procedure Act and the Rules and Regulations of the National Labor Relations Board.

The Finding or Conclusion resulted in part from certain improper Rulings of the Trial Examiner upon certain of "Employer's" motions and objections, which permitted

improper and incompetent testimony and evidence, speculations and conclusions of witnesses, testimony in violation of the parol evidence rule, immaterial and irrelevant testimony and documents, self-serving testimony and documents, hearsay evidence, and were contrary to law and the evidence.

*Intermediate Report and Recommended Order:*

Tr. pp. 56-59, 68-69, 75-85.

*Transcript of Proceedings Before the Trial Examiner:*

Tr. pp. 205, 207-208, 243-244, 248-249, 272-273, 287, 294-295, 297-298, 310-311, 319-320.

IV.

The Board's Conclusion and Finding that the Union certified by the National Labor Relations Board as the representative of "Employer's" employees for purposes of collective bargaining did not have the authority, although it was given and authorized by the Union membership, to enter into, with "Employer," an Agreement in writing that the Union and "Employer" would conduct among "Employer's" employees, at one of its plants, a private consent election in accordance with the procedure and regulations of the National Labor Relations Board to determine whether those employees desired to be represented by the Union.

This Finding or Conclusion is unsupported by any evidence in the record, is based upon the speculation of the Trial Examiner, is contrary to the National Labor Relations Act and the United States Constitution, and would deprive the Union and the "Employer" of their right to reach an agreement reduced to writing with the ultimate purpose of composing their differences.

The Recommendations based on this improper Finding or Conclusion are contrary to the National Labor Relations Act.

The Finding or Conclusion resulted, in part, from certain improper Rulings of the Trial Examiner upon certain of "Employer's" motions and objections, which permitted improper and incompetent testimony and evidence, speculations and conclusions of witnesses, testimony in violation of the parol evidence rule, immaterial and irrelevant testimony and documents, self-serving testimony and documents, hearsay evidence, and were contrary to law and the evidence.

*Intermediate Report and Recommended Order:*

Tr. pp. 46-53, 65-67, 69-74, 76-85.

*Proceedings Before the Trial Examiner:*

Tr. pp. 258-260, 265, 272-273, 297-299, 325, 328-329, 335-337.

V.

The Board's Conclusion and Finding that where the Union, after authorization from Union's membership so to do, entered into an Agreement in writing with the "Employer" that the Union and the "Employer" would conduct among its employees, at one of its plants, a private consent election in accordance with the procedure and regulations of the National Labor Relations Board to determine whether those employees desired to be represented by the Union, and the said election was conducted pursuant to said Agreement, at which all of the eligible employees at the said plant voted, and the results of the said election conclusively established that a majority of

the employees did not desire to be represented by the Union, the Union is not estopped from contending that it is not bound by the said Agreement and the results of the said election.

This Finding or Conclusion is unsupported by any evidence in the record, is based upon the speculation of the Trial Examiner, is contrary to the National Labor Relations Act and the United States Constitution, and would deprive the Union and the "Employer" of their right to reach an agreement reduced to writing with the ultimate purpose of composing their differences.

The Recommendations based on this improper Finding or Conclusion are contrary to the National Labor Relations Act.

The Finding or Conclusion resulted in part, from certain improper Rulings of the Trial Examiner upon certain of "Employer's" motions and objections, which permitted improper and incompetent testimony and evidence, speculations and conclusions of witnesses, testimony in violation of the parol evidence rule, immaterial and irrelevant testimony and documents, self-serving testimony and documents, hearsay evidence, and were contrary to law and the evidence.

Citation of the Record:

*Intermediate Report and Recommended Order:*

Tr. pp. 49-50, 53-54, 64-67, 71-72, 75-85.

*Proceeding Before the Trial Examiner:*

Tr. pp. 258-259, 272-273, 297-299, 310-311, 325, 328, 334-337.

## VI.

The Board's conclusion and finding that negotiations by Employer with the Union with regard to matters of representation, and which negotiations resulted in an Agreement in writing between the Union and the "Employer," which Agreement was fully performed by the "Employer," was not bargaining by the "Employer" as required by Section 8(a)(5) of the National Labor Relations Act, and was interference with and restraining and coercing the employees in the exercising of their rights guaranteed under Section 7, as provided by Section 8(a)-(1) of the National Labor Relations Act.

This Finding or Conclusion is unsupported by any evidence in the Record, is based upon the speculation of the Trial Examiner, is contrary to the National Labor Relations Act and the United States Constitution, and would deprive the Union and the "Employer" of their right to reach an agreement reduced to writing with the ultimate purpose of composing their differences.

The Recommendations based on this improper Finding or Conclusion are contrary to the National Labor Relations Act.

The Finding or Conclusion resulted in part from certain improper Rulings of the Trial Examiner upon certain of "Employer's" motions and objections, which permitted improper and incompletent testimony and evidence, speculations and conclusions of witnesses, testimony in violation of the parol evidence rule, immaterial and irrelevant testimony and documents, self-serving testimony and documents, hearsay evidence, and were contrary to law and the evidence.

Citation of the Record:

*Intermediate Report and Recommended Order:*

Tr. pp. 39-55, 64-85.

*Transcript of Proceedings Before the Trial Examiner:*

Tr. pp. 254-260, 261-262, 272-273, 287, 292, 294-295, 296-299, 303, 325, 328-329, 335-337.

## VII.

The Board's Conclusions and Findings that where, upon a representation proceeding, the National Labor Relations Board issued its Decision and Direction of Election finding that an appropriate unit for purposes of collective bargaining could be the separate unit at each of "Employer's" two plants, but, however, the Union was certified as the representative of the employees in a single two-plant unit, and thereafter, the Union and the "Employer" entered into an Agreement in writing that the Union and "Employer" would conduct a private consent election in accordance with the procedure and regulations of the National Labor Relations Board, and where, upon such election, in accordance with procedure of the National Labor Relations Board, all of the eligible employees voted, and a majority thereof voted against representation by the Union, such agreement and such election did not arise out of and do not constitute bargaining between the "Employer" and the Union, and were and are of no force and effect.

This Finding or Conclusion is unsupported by any evidence in the record, is based upon the speculation of the Trial Examiner, is contrary to the National Labor Relations Act and the United States Constitution, and would deprive the Union and the "Employer" of their

right to reach an agreement reduced to writing with the ultimate purpose of composing their differences.

The Recommendations based on this improper Finding or Conclusion are contrary to the National Labor Relations Act.

The Finding or Conclusion resulted in part from certain improper Rulings of the Trial Examiner upon certain of "Employer's" motions and objections, which permitted improper and incompetent testimony and evidence, speculations and conclusions of witnesses, testimony in violation of the parol evidence rule, immaterial and irrelevant testimony and documents, self-serving testimony and documents, hearsay evidence, and were contrary to law and the evidence.

Citation of the Record:

*Intermediate Report and Recommended Order:*

Tr. pp. 49-54, 64-67, 68-69, 75-85.

*Transcript of Proceedings Before the Trial Examiner:*

Tr. pp. 258-259, 272-273, 297-300, 310-311, 325, 328-329, 335-337.

### Summary of Argument.

The essence of the case is that the employees of The Deutsch Company have been deprived of their right to choose their collective bargaining representative. The agents of the National Labor Relations Board seem bound to force the employees of The Deutsch Company against their desires to accept first one Union and then another to represent them. The first time this was attempted such confusion resulted that no valid election was ever held by the Board. Despite the fact that the

Union and the "Employer" sought to rectify this error by a consent election, the Board refused to recognize the results of the consent election between the parties or to order a new election which it might conduct and which would not be tainted with administrative error. Finally when an interunion dispute broke out and a schism resulted, the Board summarily, without a hearing, sought to enforce the Trial Examiner's previous ruling.

Throughout there has been a failure of the Board properly to determine an appropriate unit for the purposes of collective bargaining.

The Board's orders were not only contrary to the law and to the policy of the Board, but also deprived the employees of The Deutsch Company of the right to choose their own bargaining representative.

For these reasons the Petition of the Board should be denied and the Petition of The Deutsch Company should be granted.

## ARGUMENT.

### I.

Where the Elected Officials of the Union Have Abandoned Their Offices in the Union and Non-elected Officials of a Separate Union Have Purportedly Usurped the Powers and Functions of Its Said Officers and Are Acting Without Any Authority and Without Complying With the Constitution and By-Laws of the Union, and the Union for Which They Purport to Act Has Never Been Certified as the Exclusive Bargaining Agent for Any of the "Employer's" Employees, Then the Said Union Does Not Represent Any of Such Employees and There Is No Existing Union Which Meets the Description of the Exclusive Bargaining Representative of the "Employer's" Employees as Set Forth in the Certification of Representatives, and This Honorable Court Should Set Aside the Orders of the Board Because the Board Should Have Heard the Entire of the Testimony in Regard to the Said Matter and Upon the Facts Rejected in the Complaint.

Subsequent to the determination by the National Labor Relations Board of its decision in Case No. 21-CA-2581, a schism occurred in the Union. The officers and leading members of the Union consisting of Nick Nardi, Anthony Doria, Bradley Smiler, and Peter Lentini were suddenly ousted. Mr. Doria's activities had been called into question. Disputes arose as to the authority of various persons to represent the employees of The Deutsch Company [Tr. pp. 97-101].

The telegram of the attorneys for the Union shows the confusion in stating that an injunction had been issued

by the Los Angeles Superior Court on September 20, 1957 in Case No. 686,697 entitled *Carl W. Griepentrog, as President, AIW-AFL-CIO v. Peter Lentini and Nick Nardi, et al.*, restraining the former officers of Local 976 from acting or purporting to act in any official capacity for or in behalf of Local 976 and from notifying or advising the company that they have authority to conduct the business or affairs of Local 976 and further restraining them from interfering in any manner whatsoever with Carl W. Griepentrog, or any authorized representative of the plaintiff, as international president of the Allied Industrial Workers of America, AFL-CIO or such international union from conducting, managing or controlling the affairs of Local 976 [Tr. pp. 102-103].

Although the Board has denied there was a dissolution or schism within Local 976, the facts were never investigated by the Board. It does appear from the said telegram which appears in the transcript [Tr. pp. 101-103] and it is alleged by the "Employer" [Tr. pp. 97-100], that certain persons, including Carl W. Griepentrog, Frank Evans and Bert Backinger, purporting to be officers and board members of the Allied Industrial Workers of America, affiliated with AFL-CIO have called upon The Deutsch Company and its representatives and claimed to be the persons entitled to bargain with The Deutsch Company as the agent and exclusive representative of The Deutsch Company's employees for the purpose of collective bargaining. However there are no facts nor are there any allegations by the Board to support the fact that Carl W. Griepentrog, Frank Evans, or Bert Backinger were elected officials of United Industrial Workers,

Local 976, AIW-AFL-CIO. It appears, therefore, that they have usurped the powers and functions of the officials of the said Local 976 and are acting without any authority.

The Certification of Representatives never listed the Allied Industrial Workers Union of America, AFL-CIO, as the representative for the purpose of collective bargaining of The Deutsch Company's employees [Tr. pp. 242-344].

The Board and the Union seek to accomplish indirectly through these men what cannot be done under the Act, that is, an Amendment to the Certification of Representatives without a hearing and a representation election.

Before such an Act can be accomplished, it is necessary that the employees to be represented be heard. The procedure of accomplishing this is through a petition and a secret ballot of the employees.

*Weatherhead Company of Antwerp*, 106 N. L. R. B. 1266 (1953);

*R. M. Hollingshead Corporation*, 111 N. L. R. B. 840 (1955).

In each of the foregoing cases there was a disaffiliation and a schism in the Union. In each of the foregoing cases the Board heard the matter on the facts and denied a motion to amend its certification stating that the Board's policy is that such matters be determined by a petition and a secret ballot of the employees concerned.

Now the Union seeks to circumvent this procedure achieving the same result by an enforcement of the Boards' orders here. The "Employer" cannot now comply with the order because it is impossible for the "Employer" to

bargain with a purported representative of its employees who, in truth and in fact, is not the representative named in the Certification of Representatives and who is being opposed by other persons claiming to have that authority.

The same policy has been followed where an international union removed defecting officers and appointed a trustee for a local. The Courts have held that the expulsion of an International Union from its parent organization coupled with disaffiliation action of the Local for reasons related to the expulsion disrupts and confuses the established bargaining relationship between the employer and the representative of the employees, creating a schism, which warrants the holding of an election despite the existence of a contract between such representatives and the employer. Therefore, the Board has found that where such a schism exists, the contract does not bar an election and has directed a representation election.

*Great Atlantic and Pacific Co.*, 120 N. L. R. B.  
No. 91, 42 Labor Rel. Ref. Man. 1022 (1958);

*Drennon Food Products Co.*, 120 N. L. R. B.  
No. 88, 42 Labor Rel. Ref. Man. 1020 (1958).

There is no evidence, nor can there be any, that the employees of The Deutsch Company voted for the Allied Industrial Workers Union of America, AFL-CIO, as their representative. What has been attempted here is to substitute the Allied Industrial Workers Union of America for Local 976. This has been sought by means of enforcing an order of the Board. However, the Board is not authorized to substitute as an exclusive bargaining representative a union for the one actually chosen by the workers

and is certified as such. To do so would be in complete violation of Section 7 of the Labor Management Relations Act of 1947 (29 U. S. C. A., Sec. 157).

In order to determine whether or not there was a loss of identity of the representative of the employee or only a change of names, the Board must examine the facts and determine the substance of the situation. It must consider whether the action has removed from the employees their basic statutory right to express their choice.

*Dickey v. National Labor Relations Board*, 217 F. 2d 652 (C. A. 6, 1954).

The Brief of the National Labor Relations Board cites *Carpenteria Lemon Assn. v. N. L. R. B.*, 240 F. 2d 554 (C. A. 9, 1956) as authority. However, that opinion does state that in matters such as this one, it is important to determine the factual issues in ascertaining the right of a successor union to assume the status of a certified bargaining agent whether the union is a continuation of the old union under a new name or an affiliation, or whether it is a substantially different organization. In the *Carpenteria* case, the factual issue was contested before a trial examiner. Even then he found that although the packing house workers had appointed a new financial administrator to replace the one previously furnished by the National Union, the officers remained the same. There was no dilution of membership as a result of the change. The contracts concluded by the union remained in effect except for the substitution of the union's new name. All of this testimony was uncontradicted.

*Carpenteria Lemon Assn. v. N. L. R. B.*, *supra*, at p. 557.

In the case now at bar, however, the factual issues have never been tried before a trial examiner or any other representative of the Board. The officers have been changed completely. A trustee has been appointed by the International Union. The "Employer" does not know whether or not contracts concluded by the previous union have remained in effect or whether membership will be diluted in the International Union.

Under all of the circumstances it appears that what has been accomplished here is an effective means of depriving The Deutsch Company employees of a voice in the choosing of their collective bargaining representative. This violates the provisions of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947. If the employees are to have the right to join labor organizations of their choosing and to bargain collectively by representatives of their own choosing, they must have the right to express their choice and not be deprived of their choice by administrative technicalities employed by the National Labor Relations Board or disputes involving interunion conflicts.

Both of these have appeared here. Further, no proper hearing has ever been afforded for the determination of these issues. The Petition, therefore, of The Deutsch Company to Modify and to Set Aside the Orders of National Labor Relations Board should be granted and the Petition of the National Labor Relations Board to Enforce its Order should be denied.

## II.

Where, After a Representation Hearing, the National Labor Relations Board Made Its Purported Decision and Direction of Election, and Purported to Hold a Certification Election While the “Employer’s” Petition for Rehearing and Reconsideration and Stay of the Election Was Pending Before the Board, and Before the Board Made Its Order or Gave Notice of Its Order or Ruling Upon the Said Petition to the “Employer” or Its Agents or Attorneys, the Purported Election Was Held, the Total Number of Those Voting at the Election Equaling No More Than Forty Per Cent (40%) of the Number of the Eligible Voters Among the Employees, the Action of the Board in Purporting to Conduct an Election and in Purporting to Issue a Certification of Representatives and in Enforcing the Said Certification of Representatives by Bringing on for Hearing the Complaint Herein Was and Is an Abuse of Its Discretion, Illegal and Invalid, Since the Board Has Violated Its Rules and Regulations, the Provisions of the National Labor Relations Act, the Administrative Procedure Act, and the Constitution of the United States in Depriving the “Employer” and Its Employees of Due Process of Law.

After the Decision and Direction of Election was issued, “Employer” filed its Petition for Rehearing and Reconsideration and Stay of the Election [Resp. Ex. 6; Tr. pp. 424 *et seq.*]. The Petition was filed on July 24, 1956. The Board did not make its order on that Petition or notify Respondent, until Respondent’s attorneys and consultants received the telegrams sent by the Board on August 10, 1956 [Resp. Exs. 8 and 9; Tr. pp. 449-450].

(The General Counsel misread the telegrams in alleging in his Brief that the telegrams were sent on August 2, 1956. The Board itself acknowledges in the body of the telegrams that there was some delay. The telegrams read in the present tense—"it is hereby ordered . . .") Notwithstanding, the foregoing, the election of August 8, 1956, was purportedly conducted.

At the August 8, 1956, election, not more than forty per cent (40%) of all of the employees voted [Tr. pp. 248-249]. This should be compared with the almost unanimous vote obtained at the consent election at the Avalon Plant in November [Tr. p. 247].

The August election was held while the Petition for Rehearing and Order staying the Election was pending before the Board, and prior to the issuance of the Board's order, or even the serving of any notice of the Board's Order.

The election was not held on "Employer's" premises, and was conducted without any list of the eligible employees. In short, to rely upon the August 8, 1956, election would amount to disenfranchising the employees at the Avalon Plant.

The "Employer" properly filed a Petition for Reconsideration to protect its rights and apprise the Board of the error in its Decision and Direction of Election.

*Foreman & Clark, Inc. v. N. L. R. B.*, 215 F. 2d 396 (C. A. 9th, 1954).

Where the results of election were so dubious and inequitable as to render the election invalid, a refusal of the

employer to bargain with the Union designated by that election is not an unfair labor practice.

*N. L. R. B. v. Wilkening Manufacturing Co.*, 207 F. 2d 98 (1953).

Enforcement of the Board's order involves the exercise of an equitable jurisdiction, and in that exercise, an examination of the manner of conducting of the Board election becomes significant.

The Board has expressed the opinion that there is no provision in the rules and regulations of the National Labor Relations Board for a Petition for Reconsideration. It overlooks the provisions of Section 102.60 of the Rules and Regulations of the National Labor Relations Board, which specifically provide for a further hearing as the Board may determine.

Unless a Petition for Reconsideration is filed by the "Employer," setting forth its objections to the Decision and Direction of Election, and raising the questions it desires to be opened or reopened, the "Employer" may be considered to have waived them.

*National Carbon Co.*, 110 N. L. R. B. 2184 (1954);  
*Superior Sleeprite Corporation*, 109 N. L. R. B. 322 (1954).

While the Petition for Reconsideration was pending, the Board should have stayed the election, since the outcome of that election could not be determinative while the Decision and Direction of Election was challenged.

*Administrative Procedure Act*, 5 U. S. C. A., Secs. 1004(b), 1005(d), 1007(b).

To conduct an election prior to notifying the “Employer” of the Board’s ruling on the Petition for Reconsideration, deprives the employees of the fullest freedom in exercising their rights to determine their collective bargaining representative.

*National Labor Relations Act*, Sec. 9(b);

29 U. S. C. A., Sec. 159(b).

Upon the August 8, 1956 election and the Certification of Representatives, an order might issue from the Board and the Court of Appeals of the Ninth Circuit might enforce it by ordering the “Employer” to bargain with an exclusive representative not desired by the employees, in a unit inappropriate for purposes of collective bargaining. Failure of the “Employer” to comply might result in a citation for contempt. This would not only deprive the “Employer” of due process of law by refusing it a proper determination of the unit of its employees appropriate for collective bargaining purposes before proceeding with the election, but it would also deprive the employees of their rights under the Act and of the due process afforded them by the United States Constitution, Fifth Amendment.

III.

- A Complaint Alleging a Violation of Section 8(a), (1) and (5) of the Act on the Ground That "Employer" Refused to Bargain With the Union as the Exclusive Representative of the Employees in a Unit for Bargaining Consisting of the Production and Maintenance Employees at Both of the Plants, Which Unit Is Inappropriate for the Purposes of Collective Bargaining Within the Meaning of Section 9(b) of the National Labor Relations Act, Should Be Dismissed.
- A. The Only Unit Appropriate for Purposes of Collective Bargaining, Under Section 9(b) of the National Labor Relations Act, Is the Single Plant Unit, and a Company Unit Is Inappropriate, Where the "Employer" Has Two (2) Plants Which Are Geographically Separated, Which Manufacture Different Products and Sell the Products Separately Out of Separate Sales Departments and Separate Catalogs, Which Separate Plants Are in Different Cities, and Are Operated Under Separate Autonomous Plant Managers, With the Authority to Hire and Fire Employees, Each Responsible Only to the Board of Directors of the "Employer's" Corporation, Where the Separate Plants Have Different Working Conditions and Hours of Work, Where the Skills Employed in Each of the Separate Plants Are Different From Those Employed in the Other, the Employees in One Plant Being Mostly Highly Skilled Machinists (the Avalon Plant), and the Employees in the Other Plant Being Unskilled Assemblers and Packagers (the Regent Plant), Where Each Plant Has Rates of Pay Different From the Other, Where the Classification of the Workers by Sex Is Predominantly Male at the Avalon Plant, and Almost Entirely Female at the Regent Plant, Where the "Employer" Has No Uniform Personnel Policy for Both of its Plants, There Being an Incentive Plan at

the Avalon Plant, and No Incentive Plan at the Regent Plant, Where There Is No Interchange of Personnel Between the Plants nor Uniform Seniority List Between the Plants and Where the Majority of the Production and Maintenance Employees at One Plant, by Secret Ballot Election, Expressed Their Wish Not to Be Represented by the Union (the Avalon Plant), While It Was and Is Believed, in Good Faith, by Both the Union and the "Employer" That a Majority of the Production and Maintenance Employees at the Other Plant (the Regent Plant) Did Desire Representation by the Union.

The determination of the unit appropriate for collective bargaining is of vital concern to the "Employer." In the present labor market, the employees are quick to reject employment where working conditions are not to their liking, where they suspect arbitrary treatment or feel deprived of their rights. Thus, the desire of the employees to be represented in a particular unit and by a particular Union is deserving of great respect. The employer who disregards these matters may lose his working force. Many of the employees have been employed by "Employer" for a long time. They are a good working force. The "Employer," for reasons of loyalty to them,, as well as the business purposes of retaining a good working force, is obliged to exert its best efforts to obtain recognition for their expressed preferences.

The complete record in this case uncontradictedly shows that the following significant elements distinguish each of the two plants from the other :

(1) The plants are physically separated, being approximately two and one-half to three miles apart, and in separate cities. The Avalon Plant is in Los Angeles, and the

Regent Street Plant is in Huntington Park. By reason thereof, the plants pay separate sales and license taxes, and are subject to different municipal ordinances, regulation and administration [Tr. pp. 164-165].

(2) The Avalon Plant manufactures and produces approximately fifty to one hundred various products, generally rivets, screws machine products, and valves of various types. The Regent Street Plant assembles Army-Navy fittings, electronic aircraft fittings, and some commercial hydraulic fittings [Tr. pp. 165, 176, 311].

(3) Generally, the Avalon Plant is a machine tool shop, consisting of machine operators, forge operators, drill press operators, polishers, burrers, and assemblers and packers of its products. The Regent Street Plant, on the other hand, is an assembling and packing operation. Avalon receives none of the products of Regent Street, while the Regent Street Plant does receive approximately  $8\frac{1}{3}$  per cent of Avalon's monthly output for its requirements in its assembly functions [Tr. pp. 311-313].

(4) The job classifications at Avalon consist of 22 separate classifications, as follows:

Automatic Screw Machine Operators

Turret Lathe Operators

Shucker Operators

Milling Machine Operators

Drill Press Operators

Tappers

Punch Press Operators

Production Grinders

Forge Press Operators

Die Cast Operators

Polishers and Deburrers  
Inspectors  
Wash House Operators  
Tool and Die Makers  
Tool Grinders  
Tool Crib Attendants  
Yard Workers  
Maintenance Man  
Assemblers  
Packers  
Shipping and Receiving Clerks—and  
Production Control Clerks.

At Regent Street, on the other hand, there are only 4 job classifications, consisting of assemblers, packagers, shipping and receiving clerks, and production control clerks. Although the names of the 4 classifications at Regent Street also are used in classifying jobs at Avalon, there is no duplication of the functions. The assemblers at Avalon, for example, are also drill press operators, and work a substantial amount of the time as drill press operators. The assemblers at Regent, however, are unskilled assemblers, working upon the products being assembled there [Tr. pp. 311-313].

(5) The employees at Avalon number approximately 375, while those at Regent Street number approximately 85. Two-thirds of the Avalon employees are male, while seven-eighths of the Regent Street employees are female [Tr. p. 313]. The majority of the Avalon employees are highly skilled machine operators, as many as 250 being numbered in this category. Regent Street, on the other hand, has 50 unskilled assemblers, 20 unskilled

packagers, 10 unskilled shipping and receiving clerks, and 2 production control clerks.

(6) The working hours are entirely different at the two plants, since Avalon has two shifts, each shift having two sections, one for male employees, and one for female employees. The Regent Street Plant, on the other hand, has only one shift for both male and female. The rest periods, in addition, differ between the two plants. The Avalon Plant regularly works overtime, on a schedule of overtime work on Saturday every other week. Regent Street, on the contrary, very rarely works overtime, and then only irregularly [Tr. pp. 165, 313-315].

(7) There is no uniform labor policy for the two plants, since, for example, incentive pay is available at Avalon, but not at the Regent Street Plant. There is no interchange of the personnel between the Avalon and the Regent Street Plant, and there is no uniform seniority list for both of the two Plants [Tr. p. 315].

(8) Each of the Plants has its own customers, which are serviced by separate sales departments, using separate catalogs [Tr. pp. 168-169, 317].

(9) Each of the plants is operated under an autonomous supervisor. Mr. Philip Holzman is the Manager of the Avalon Plant, and Mr. Edward Jones is the manager of the Regent Street Plant. Each of these Managers reports to the Board of Directors of the Company [Tr. pp. 171-172, 315-316].

(10) Not only does each of the Plants have separate working conditions, hours, rates or pay, and generally distinct interests among its employees on the subject of collective bargaining, but, in addition, the sentiment of

the employees at each of the Plants differs in the desire for representation by the Union for collective bargaining. A majority of the employees at the Regent Street Plant did favor representation by the Union, while at the Avalon Plant the majority do not desire representation by a Union for purposes of collective bargaining [Tr. pp. 247, 315].

Under similar circumstances, the Board has found separate Plant units appropriate. In *Mullins Lumber Company*, 94 N. L. R. B. 28 (1951), the separate Plant units were found to be appropriate, in view of the separate supervision in each Plant, the considerable autonomy maintained at each Plant, the different skills required of the employees in particular Plants, and the lack of contact and interchange among the employees. This was true in spite of the fact that one payroll clerk, working at one of the Plants, prepared the payrolls for all of the operation, and although one bookkeeper maintained the books for the Plants. Moreover, one maintenance crew maintained and serviced all equipment for all of the Plants, and even, in some instances, skills at the lumber plant and sawmill plant were similar.

The facts with regard to The Deutsch Company and its employees more conclusively establish the appropriateness of separate Plant units than the authority of *Mullins Lumber Company* requires.

Where the hours of work vary between two stores, and separate hiring and firing is done in each store, there being no interchange of clerks from store to store, and seniority being on individual store basis, the single store of a chain was found to be the appropriate unit, even though the

local store managers who had autonomy in the hiring and firing of the employees could not grant wage increases.

*V. J. Elmore Stores, Inc.*, 99 N. L. R. B. 1505 (1952).

The fact that top management may have its headquarters at one particular plant, and there establish broad policies in the engineering or administration or labor relations fields, does not preclude a Board finding that a single Plant unit is appropriate.

*Northrup Aircraft, Inc.*, 110 N. L. R. B. 1349 (1954).

See, also:

*In re Clark Thread Company, Employer, and Textile Workers Union of America*, 79 N. L. R. B. 542 (1948);

*In re Foremost Dairies, Inc. and Amalgamated Meat Cutters and Butchers Workmen of America*, 80 N. L. R. B. 764 (1948);

*Charles Ingram Lumber Co.*, 100 N. L. R. B. 440 (1952).

Even where a district manager is responsible for operation of all the stores in a district, and establishes personnel and labor policies for the entire district, and all the hiring and wage increases are subject to his approval, and discharges may be made only by him, the separate store was considered the appropriate unit, since the local store managers retained a certain degree of autonomy, and supervised daily operations and although there were temporary interchanges among the employees between the stores.

*In re Liggett Drug Company*, 110 N. L. R. B. 949 (1954).

Traditionally, where the various considerations are evenly balanced with regard to the determination of the appropriate unit (which “employer” does not concede), the determining factor is the desire of the employees themselves.

See:

*Globe Machine and Stamping Company*, 3 N. L. R. B. 294 (1937).

Where the two groups at a trucking company’s terminal and at its general office, worked under different immediate supervision, had different work schedules, and where the work at the terminal pertained only to the terminal, and the work at the general office pertained to all the terminals of the Company, there was some basis for a multi-plant unit, since the employees had similar skills and duties, the wage rates were comparable, although there was some interchange of employees. But, even so, a self-determination election was ordered.

*Pacific Inter-Mountain Express Company*, 105 N. L. R. B. 480 (1953).

See, also:

*In re David Matson Company*, 109 N. L. R. B. 184 (1954);

*In re Lumber Fabricators, Inc.*, 110 N. L. R. B. 187 (1954);

*Sprague Electric Company*, 98 N. L. R. B. 533 (1952).

By all the indicia which have been used by the Board and by the Courts, the single plant unit is the only appropriate unit of the employees for collective bargaining under Section 9(b) of the Act. There is no evidence to support, nor can there be any evidence to support, a multi-plant or a company unit in this case.

**B. Where the "Employer" Has Not Refused to Bargain With the Union on the Basis of the Unit Appropriate for Collective Bargaining Purposes Under Section 9(b) of the National Labor Relations Act, a Complaint Alleging a Violation of Sections 8(a), (1) and (5) for Refusal to Bargain Will Be Dismissed.**

The National Labor Relations Act requires the "employer" to bargain with the representatives of its employees, subject to the provisions of Section 9(a).

*National Labor Relations Act*, Sec. 8(a)(5);  
29 U. S. C. A., Sec. 158(a)(5).

Section 9(a) defines the exclusive representative of the employees for purposes of collective bargaining as the representative in a unit appropriate for purposes of collective bargaining. This determination is to be made to assure the fullest freedom to the employees in exercising their rights guaranteed by the National Labor Relations Act.

*National Labor Relations Act*, Sec. 9(b);  
29 U. S. C. A., Sec. 159(b).

However, if the unit is, in fact, inappropriate, the employer would violate the rights of the employees and the provisions of the Act in bargaining with a purported representative for an inappropriate unit.

*Endicott-Johnson Corp.*, 108 N. L. R. B. 88 (1954).

See, also:

*Goddard & Co., Inc.*, 105 N. L. R. B. 849 (1953).

Thus, the employer's refusal to bargain, even with a certified Union, which is not the representative of the employees in an appropriate unit, is not a violation of Section 8(a)(5) of the Act.

*Carson Pirie, Scott & Company*, 75 N. L. R. B. 1244 (1948).

IV.

The Board's Purported Decision and Direction of Election Does Not Conclusively Determine the Issue of What Is the Appropriate Unit for Purposes of Collective Bargaining Upon a Complaint Based on an Alleged Charge by the Union That the "Employer" Has Violated Section 8(a), Subsections (1) and (5), of the Act in Refusing to Bargain With the Union, Where, Since the Representation Hearing There Has Been Either Evidence Newly Discovered Which Would Affect the Determination of the Appropriate Unit or Where, Since the Representation Hearing, There Has Been a Change of Circumstances or Where the Finding of the Board as to the Appropriate Unit in Its Decision and Direction of Election and Its Conduct of the Election Was Arbitrary and an Abuse of Its Process.

- A. A Finding of the Board as to the Appropriate Unit Is Not Conclusive and Should Be Set Aside Where There Is Evidence Newly Discovered Since the Representation Hearing That the "Employer" and the Union Agreed That a Separate Plant Unit Was the Appropriate Unit and to Conduct a Consent Election Wherein the Employees Voted on a Single-Plant Basis in a Secret Ballot Consent Election Conducted by the Union and the "Employer" to Determine Whether They Desired to Be Represented by the Union for Purposes of Collective Bargaining and Where, Upon a Vote of One Hundred Per cent (100%) of the Eligible Employees at the Avalon Plant, a Majority Thereof Voted Against Representation by the Union.

At the time of the Representation Hearing in Case No. 21-RC-4365, substantially all of the testimony involved the determination of who were supervisory employees,

which issue the Union ultimately conceded. The Hearing Officer did not receive evidence, and so the Board could not consider the effect of such matters as the similarity of working conditions, the character of the plants, the anticipated effectiveness of any particular unit in maintaining industrial peace through collective bargaining, whether or not the employees at each of the plants had distinct interests from employees of the other plant, whether or not there was a history of collective bargaining, the difference in working conditions, hours, wages, and manufacturing processes and, most important, what, if any, was the desire of the employees at each of the plants for representation [Tr. pp. 164-200].

See:

*Pittsburgh Plate Glass Company v. N. L. R. B.*,  
313 U. S. 146 (1941).

The purported Decision and Direction of Election was therefore based upon evidence insufficient to find what unit of employees was appropriate for Collective Bargaining.

The Decision and Direction of Election based on the Representation Hearing is, of course, not subject to direct review.

*Pittsburgh Plate Glass Company v. N. L. R. B.*,  
*supra*;

*American Federation of Labor v. N. L. R. B.*, 308  
U. S. 401 (1940).

Therefore, the review of the finding and determination of the issue of the appropriate unit is subject to challenge only when, after hearing upon a Complaint alleging an unfair labor practice, such as a refusal to bargain, the issue of the appropriateness of the unit is raised.

The finding of the Board based upon the Representation Hearing is not conclusive under certain circumstances on the issue of the appropriateness of the unit at the hearing upon the Complaint alleging unfair labor practice.

*Baker and Taylor Co.*, 109 N. L. R. B. 245 (1954).

Where the determination of the unit was so arbitrary as to make its approval an abuse of discretion, the finding in, and the direction of the Decision and Direction of Election, and the Certification of Representatives, is not conclusive at the hearing upon the Complaint. Furthermore, where there is newly discovered evidence unavailable at the time of the Representation Proceedings, or any change in the facts from those underlying the situation at the time of the Representation Hearing, the appropriateness of the unit is subject to challenge.

*Baker and Taylor Co.*, *supra*;

*American Steel Buck Corporation*, 110 N. L. R. B. 2156 (1954).

It has been established, without contradiction, that no evidence was introduced upon the time of the Representation Hearing, nor was any evidence available on the sentiment of the employees at either of the plants separately or together, to determine whether the employees desired to be represented by the Union for the purposes of Collective Bargaining [Tr. pp. 247, 307-310, 319-320].

Those who conducted the August 8, 1956, election after the Representation Hearings, had no list of the employees [Tr. pp. 248-249]. There was no positive way of determining whether or not the persons voting were

employees eligible to vote even under the unit designation in the Decision and Direction of Election. A Certification of Representatives based upon the August 8th election disenfranchises the employees.

However, on November 12, 1956, the Union and the "Employer" agreed in writing to a consent election to determine whether or not a majority of the production and maintenance employees at the Avalon Plant desired to be represented by the Union [Resp. Ex. 4; Tr. pp. 238-240, 306, 322-324].

The Board, therefore, had before it new evidence, newly discovered and not available at the Representation Hearings that the Union regarded the sentiment of the employees at the Avalon Plant as determinative of whether or not the Union should be the bargaining agent for the Avalon employees. Mr. Doria himself stated that if he did not have a majority at the Avalon Plant, he did not want to represent them [Tr. pp. 239-240].

Newly discovered evidence not available at the time of the Representation Hearings is the result of the consent election, wherein all of the eligible employees at the Avalon Plant voted. A majority of the Avalon Plant voted against representation by the Union, although a majority, it is conceded, at the Regent Plant did favor Union representation. This evidence is particularly significant in view of the importance which is attached to the desire of the employees of one plant for Union representation, while the other plant's employees rejected the Union, and all of the other determinative factors involved establish that the single plant unit is the only appropriate unit. Together with the distinctions between the employees at each of the

plants in working conditions, pay, hours, different skills involved, autonomous management, and dissimilarity between the employees at each of the plants, their separate desires with respect to Union representation conclusively proves that the only effective unit in maintaining industrial peace through collective bargaining is the separate plant unit.

*Pittsburgh Plate Glass Company v. N. L. R. B.,  
supra.*

**B. A Finding of the Board as to the Appropriate Unit Is Not Conclusive and Should Be Set Aside Where There Is a Change of Circumstances Since the Representation Hearing That the "Employer" and the Union Agreed That a Separate Plant Unit Was the Appropriate Unit and to Conduct a Consent Election Wherein the Employees Voted on a Single-Plant Basis in a Secret Ballot Consent Election Conducted by the Union and the "Employer" to Determine Whether They Desired to Be Represented by the Union for the Purposes of Collective Bargaining and Where Upon a Vote of One Hundred Per Cent (100%) of the Eligible Employees at the Avalon Plant, a Majority Thereof Voted Against Representation by the Union.**

The evidence is undisputed that since the Representation Hearing, the Union entered into an agreement [Resp. Ex. 4], whereby the Union explicitly agreed to the holding of a private, secret ballot consent election for the determination of whether or not a majority of the production and maintenance employees at the Avalon Plant desired to be represented by the Union. The Union further agreed that in the event representation by it was rejected by these employees, it would not negotiate or bargain further with

regard to the employees at the Avalon Plant [Tr. pp. 238-240, 306, 322-324].

Thereafter, the entire of the production and maintenance employees eligible to vote at the Avalon Plant voted, and by a vote of one hundred sixty-nine (169) to one hundred thirty-seven (137), rejected representation by the Union [Tr. p. 247].

The Union, having entered into an agreement whereby it expressly consented to an election to determine whether or not it represented a majority at the plant, and by reason thereof, that the appropriate unit for the representation of the employees was the single plant unit, that if it lost the election, it would not proceed to bargain further with regard to the employees of Avalon. The Union has, therefore, abandoned its representation of the employees at the Avalon Plant.

A majority of the Union members at their meeting approved the Union's entering into the Agreement of November 12, 1956 [Tr. pp. 337, 368-372]. Thereafter, the employees, at the Avalon Plant, given the opportunity to express their preference, decided against no representation.

It has been the opinion of the Courts that the National Labor Relations Board should not force an unwanted bargaining representative upon the employees.

*N. L. R. B. v. Hamilton*, 220 F. 2d 492 (C. A. 10th, 1955);

*Frank Bros. v. N. L. R. B.*, 321 U. S. 702 (1944).

Where the Union has agreed after the Union members themselves had approved the agreement, to accept the decision of a majority of the Avalon employees in a consent

election as determinative of whether or not they desired to be represented by the Union, the Board should not force the bargaining representative on the Avalon employees. All of the parties involved agreed to that decision and should respect it.

Thus, the circumstances having significantly changed from those upon which the Board made its Decision and Direction of Election, the finding with respect to the unit appropriate for collective bargaining is not conclusive here.

*Baker and Taylor Company, supra;*

*Pittsburgh Plate Glass Company v. N. L. R. B., supra.*

**C. A Finding of the Board as to the Appropriate Unit Is Not Conclusive and Should Be Set Aside Where the Board Acted Arbitrarily and Abused Its Processes in Making Its Finding and Its Decision and Direction of Election Based Thereon, Directing an Election Among the Employees in a Company Unit Consisting of the Production and Maintenance Employees in Both of the Plants, Where There Was Not Sufficient Evidence at the Representation Hearing to Support Such a Finding, and Where Such a Finding and Direction of Election Is Contrary to the Evidence Upon the Representation Hearing and the Law.**

On the state of the record at the Representation Hearing, evidence was not sufficient to support the finding that the Company unit was appropriate for purposes of collective bargaining under Section 9(b).

The Decision and Direction of Election [General Counsel's Ex. 2] concedes that a single plant unit would be

appropriate [Tr. p. 339]. Some of the statements in the Board's finding are clearly erroneous, as, for example, that eighty per cent (80%) of the Regent Plant's assembly components come from Avalon. The true fact is that Regent receives only eight and one-third per cent ( $8\frac{1}{3}\%$ ) of Avalon's output for its assembly functions [Tr. p. 311]. There is further *no* interchange of personnel between the two (2) plants, and the employees at each of the two (2) plants have substantially different, not similar, skills [Tr. pp. 311-314]. The Respondent's plants are not centrally administered, functionally integrated nor does Respondent have any uniform personnel policy [Tr. pp. 165, 171-172, 313-316].

The evidence at the Representation Hearing proved that each of the plants is under separate administration, with autonomous control of the plant manager over the plant [Tr. pp. 171-172, 315-316]. There is no interchange in the personnel. The plants are operated on different shifts with different hours, and the majority of the employees in each are different sexes, the Avalon Plant being substantially male and the Regent Plant substantially female [Tr. pp. 165, 313-315]. Furthermore, no mutual interests on the subject of collective bargaining exists between the two (2) plants, since the employees at the Avalon Plant, are, in the main, highly skilled machine tool workers, while all of the employees at the Regent Plant are unskilled assemblers or packagers. Even the assemblers at the Avalon Plant are also drill press operators, and have different wage scales and conditions of work than do the assemblers at the Regent Plant [Tr. pp. 311-313].

Respondent has no uniform personnel policy for both plants. There is incentive pay at the Avalon Plant, but not at the Regent Plant. There is no single seniority list for both Plants [Tr. p. 315].

The Board acted arbitrarily and abused its discretion in finding on this evidence that the appropriate unit, for the purposes of collective bargaining, is the company unit.

Where the finding by the Board of the unit appropriate for collective bargaining was arbitrary, and an abuse of discretion, the finding will not be conclusive at a hearing upon a Complaint for an alleged refusal to bargain in violation of Sections 8(a), (1) and (5).

*Baker and Taylor Company, supra;*

*Pittsburgh Plate Glass Company v. N. L. R. B.,  
supra.*

V.

Where the "Employer" Negotiated With the Union, and Bargained With the Union, and After so Doing, Entered Into an Agreement in Writing With the Union, Which Agreement Was Authorized by the Union's Membership, That the Union and the "Employer" Would Conduct Among the Employees at One of the Plants, a Private Consent Election in Accordance With the Procedure and Regulations of the National Labor Relations Board to Determine Whether These Employees Desired to Be Represented by the Union, and the Said Election Was Conducted Pursuant to the Terms of the Said Agreement, at Which Election All of the Eligible Employees at the Said Plant Voted, and the Results of the Said Election Conclusively Established That a Majority of the Employees Did Not Desire to Be Represented by the Union, the Union Is Bound by the Said Agreement and the Results of the Said Election That It Would Not Continue to Act as the Collective Bargaining Representative of the Said Employees at the Said Plant, and the Said Agreement, and the Said Election, Constitute Bargaining Between the "Employer" and the Union, and Are of Full Force and Effect as Determining the Rights of the "Employer," the Union, and the Employees, and the "Employer" Has Bargained With the Union, as Required by Section 8(a)(5) of the National Labor Relations Act, and Has Not Interfered With, nor Restrained, nor Coerced Its Employees in the Exercise of Their Rights Guaranteed Under Section 7 of the Act, nor Has the "Employer" Violated Section 8(a)(1) of the Act, and the Union Is Estopped From Contending That It Is Not Bound by the Said Agreement and

the Results of Said Election or That the "Employer" Has Violated Sections 8(a)(1) and 8(a)-(5) of the National Labor Relations Act, or That Any Question "Affecting Commerce" Exists Concerning Representation of the Employees Under Sections 9(c), 2(6) and 2(7) of the National Labor Relations Act.

The evidence is uncontroverted that whatever requests were made of the "Employer" by the Union were in good faith met by the "Employer" [Tr. pp. 274-282, 303-305, 372-373, 375-377, 284-286, 288-289]. The Act only requires good faith bargaining, with the purpose of reaching an agreement; it does not require that a particular form of the agreement be reached.

*National Labor Relations Act*, Sec. 8(d);

29 U. S. C. A., Sec. 158(d);

*N. L. R. B. v. Whittier Mills Co.*, 123 F. 2d 725 (C. C. A. 5, 1941).

See also:

*N. L. R. B. v. Norfolk Shipbuilding and Drydock Corporation*, 195 F. 2d 632 (C. A. 4, 1952).

This does not, of course, mean that the Board or the Court will make collective bargaining agreements for the Union, or prescribe what shall be written into them, and neither the Courts nor the Board will interfere in negotiations between the employer and representatives of the employees, as long as they are being carried on in good faith.

*N. L. R. B. v. Corsicana Cotton Mills*, 179 F. 2d 234 (C. C. A. 5, 1950).

The “Employer” complied with the request of the Union that the “Employer” enter into an agreement to hold a secret ballot consent election to determine the wishes of the majority of the employees at the Avalon Plant [Tr. pp. 238-240, 306, 322-324]. The election was held [Tr. p. 249]. Following the results of that election, and acting upon and following faithfully the provisions of that Agreement, the “Employer” has proceeded to bargain further with the Union as to various matters at the Regent Plant [Tr. pp. 284-286, 288-289]. The meeting of December 4, is evidence of that.

Thus, where there was a request to enter into a written agreement on terms which were agreeable to both the Union and the “Employer,” such an agreement was executed. As long as the company has not refused to bargain and meets with the Union to discuss its proposals in good faith and to agree to matters as to which there is agreement, there is no refusal to bargain.

*Marshall Car Wheel and Foundry Co.*, 105 N. L. R. B. 57 (1953).

There is no question that the “Employer” did bargain on every paragraph in the collective bargaining agreement form at the December 4 meeting [Tr. pp. 284-286].

See:

*N. L. R. B. v. San Angelo Standard, Inc.*, 228 F. 2d 504 (C. A. 5, 1955);

*American Laundry Machinery Company*, 107 N. L. R. B. 1574 (1954).

“Employer” at all times acted in good faith. Its doubt as to the appropriateness of the unit was, and is, held

in good faith. The Union has conceded that, having entered into the agreement of November 12, 1956. The “Employer’s” good faith doubt is borne out by the clear-cut results of the November 16 consent election. Under these circumstances, the actions of the Respondent cannot be considered a violation of Section 8(a)(5) of the Act.

*Little Champ Manufacturers, Inc.*, 104 N. L. R. B. 985 (1953);

*H. Wenzel Tent and Duck Company*, 101 N. L. R. B. 217 (1952).

See also:

*Industrial Stationery & Printing Co.*, 103 N. L. R. B. 1011 (1953);

*Buzza Cardoza*, 97 N. L. R. B. 1342 (1952);

*Gazette Publishing Co.*, 101 N. L. R. B. 1694 (1952);

*Chalet, Inc.*, 107 N. L. R. B. 109 (1953);

*Ferguson-Steere Motor Co.*, 111 N. L. R. B. 1076 (1955).

The evidence conclusively proves the agreement of all the parties who may be involved here. In the first place, the Union members themselves consented to the Union’s entering into the agreement [General Counsel’s Ex. 14; Tr. p. 365] to determine the desires of the employees for Union representation, and that representation be based upon a single plant unit for collective bargaining. The Union and the Company thereupon entered into the written agreement [Resp. Ex. 4; Tr. pp. 375-377] and finally, the majority of the employees at the Avalon Plant voted against representation by the Union [Tr. p. 247].

An analogous case is *Mid-Continent Petroleum Corp. v. N. L. R. B.*, 204 F. 2d 613 (C. A. 6th, 1953), cert. den. 346 U. S. 856 (1953). In *Mid-Continent Petroleum Corp.*, the employer was held not guilty of the charge of refusing to recognize or bargain collectively with a certified representative as the collective bargaining representative of his employees, where the employees themselves had determined that they did not desire the certified union as their bargaining representative, and had so notified the employer. There, the Union and Union members had not agreed to accept the employees' wishes as determinative, which additional elements do exist in the facts here.

*Brooks v. N. L. R. B.*, 348 U. S. 96 (1954), bears little resemblance to the uncontradicted facts in this case. In *Brooks*, neither the Union membership nor the Union agreed to the rejection of the Union by the employees. Moreover, the employees' rejection was made in the form of a letter addressed to the employer and signed by the employees, numbering a majority, who did not desire the Union to represent them. An open letter might carry some connotation of pressure upon the employees, and the Supreme Court properly distinguished between rejection by open letter and a determination by secret election. In the latter procedure the privacy and independence of the voting booth is protected. But here, the Union agreed to a secret ballot consent election to ascertain the employees' desires. *Brooks*, therefore, is distinguishable, since here the Union agreed to the election and the "privacy and independence of the voting booth" was preserved. (See *Brooks v. N. L. R. B.*, 348 U. S. at 100.)

The employees should not be prevented by an order of the Board or of a court from fairly choosing their own representative for collective bargaining (*N. L. R. B. v. Red Arrow Freight Lines*, 193 F. 2d 979 (C. A. 5, 1952)).

The employees should not be prevented by an order of the Board or of the Court from fairly choosing not to be represented by a Union. This is the only conclusion that can be drawn from the declaration of the "rights of employees" set forth in Section 7 of the Act, which gives them the right to self-organization, to form, join, or assist labor organizations, and also "the right to refrain from any or all of such activity. . . ."

This Agreement of November 12, 1956 [Resp. Ex. 4; Tr. pp. 375-377] having been entered into in the State of California, is subject to interpretation under and pursuant to the laws of the State of California. By this Agreement, the Union rescinded and abandoned their rights, if any, by the mutual consent of the Union and the "Employer," concurred in by the Union membership and the employees.

*Cal. Civ. Code*, Sec. 1689, sub. 5.

An abandonment may be implied from the acts of the parties, including a repudiation of the rights by one of the parties, and the acquiescence of the other in such repudiation.

*McCreary v. Mercury Lumber Distributors*, 124 Cal. App. 2d 477, 268 P. 2d 762 (1954);

*Desert Seed Co. v. Garbus*, 66 Cal. App. 2d 838, 195 P. 2d 184 (1944);

*Gardner v. Shreve*, 89 Cal. App. 2d 804, 202 P. 2d 322 (1949).

Employees who have designated a Union as their bargaining representative by signing cards, could disclaim the Union as their bargaining representative, and the employer would not be guilty of an unfair labor practice in following the wishes of a majority of the employees.

*N. L. R. B. v. Mayer*, 196 F. 2d 286 (C. A. 5, 1952).

See, also:

*N. L. R. B. v. Reeder Motor Co.*, 202 F. 2d 802 (C. A. 6, 1953).

Here, all of the parties did, by their acts and by their consent, agree that if the majority of the employees voting in the consent election at the Avalon Plant decided against representation by the Union, the Union would thereupon not request further bargaining with respect to the Avalon Plant.

The Union, its members, the employees eligible to vote at the Avalon Plant, and the "Employer" all agreed to the conducting of, and the Union and "Employer" did conduct a self-determination election, at which the Union was rejected. This shows the true intent of all of the parties involved, including the employees.

The Board has held that there was no violation of Section 8(a)(5) of the Act, where a Union demanded a meeting with the company, and at the meeting outlined various methods to be utilized in resolving the question of whether or not the Union represented a majority of the employees. The Union requested the Company to sign an interim agreement in order to secure a speedy determination of the majority question, and the Union

conditioned any obligation on the part of the Company to engage in collective bargaining upon the Union's receiving a majority of the votes cast in the election.

*Eaton Bros. Corp.*, 98 N. L. R. B. 464 (1952).

Here, as in the *Eaton Bros.*, the Union was simply endeavoring to determine its majority status at Avalon by an election pursuant to an agreement. This is insufficient to support a violation of Section 8(a)(5) of the Act. By reason thereof, there can be no violation here of Section 8(a)(1) of the Act, nor is there any question "affecting commerce" concerning the representation of the employees under Sections 9(c), 2(6) and 2(7) of the National Labor Relations Act.

In *The Matter of the Sullivan Company*, 84 N. L. R. B. 226 (1949), the Board reversed the Trial Examiner, and held that the Company had not violated Section 8(a)(5) of the Act where the Union was requesting a determination by the employees as to whether they wanted the Union to represent them as their bargaining representative. Note that in *Sullivan Company*, as well as here, the Union did not represent a majority.

See, also:

*Matter of Bausch & Lomb Optical Company*, 69 N. L. R. B. 1104 (1946);

*N. L. R. B. v. Valley Broadcasting Company*, 189 F. 2d 582 (C. A. 6th, 1951).

In essence, therefore, the duty of the "Employer" to bargain arises only upon the Union's request.

The obligation to bargain is not renewed after a single refusal, but can only be claimed to be a continuing obligation when requests are made.

*American Federation of Grain Millers A. F. of L.  
v. N. L. R. B.*, 197 F. 2d 451 (C. A. 5th, 1952).

### Conclusion.

For reasons stated hereinabove, the Petition of the Board should be denied and the Petition of The Deutsch Company should be granted.

Respectfully submitted,

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